Supreme Court, U.S.
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No. 06-1004

IN THE

SUPREME COURT OF THE UNITED STATES

AMBROSE MOSES, III,

PETITIONER,

vs.

STERLING COMMERCE (AMERICA), INC., PAUL L.H. OLSON, THOMAS WILLIAMS, PHYLLIS HOHE, TERRY THOMAS, AND MELISSA COLEMAN,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

Respondent Sterling Commerce's brief in opposition contains a number of misstatements of fact and law.

I.

In an effort to conceal from the Court the true nature of the issues in dispute, Sterling Commerce begins its brief in opposition by intentionally misstating the Questions Presented for review in this case. Petitioner Moses has set forth two (2) clear and unambiguous Questions Presented in the Petition for a Writ of Certiorari. The first question presented cites the magistrate's failure to act in accordance with 28 U.S.C. §143 which requires that all proceedings be postponed when there is no district judge assigned to a case.

Sterling Commerce's brief makes no mention whatsoever of 28 U.S.C. §143. Moses raised this issue to both the district court and the court of appeals. Surprisingly, both the district court and the Sixth Circuit Court of Appeals refused to interpret and apply this statute to this case. The magistrate's failure to comply with the statutory requirements or even to acknowledge the existence of the statute is truly egregious and a denial of substantive and procedural due process. Sterling Commerce's refusal to even proffer an argument on the issue is an indication as to how clearly erroneous the magistrate, the district, and the court of appeals are with respect to the 28 U.S.C. §143 issue raised by Moses. The 28 U.S.C. §143 issue

is the proverbial "pink elephant in the room" that no one wants to acknowledge.

All actions taken by the magistrate when there was no Article III district judge assigned to the case violated 28 U.S.C. §143 and, as a result, were unlawful. All Moses asks is that

> 1. the district court, and the magistrate who is an employee of the district court, be made to adhere to the applicable statutory law,
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> 2. all actions of the magistrate that occurred while there was no Article III district judge assigned be declared void ab initio, and
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> 3. the case be remanded back to the district with orders to assign an Article III district judge, vacate the magistrate reference, and proceed with the litigation.

II.

Sterling Commerce also asserts that the parties consented to referral and disposition by a magistrate under 28 U.S.C. §636(c). This is true, however, referral of a matter to a magistrate and assignment of a case to an Article III district judge are two different things. Referral to a magistrate and assignment to an Article III district judge can and must co-exist. This means that a case can be both assigned to an Article III district judge and also referred to a magistrate pursuant to the Federal Magistrates Act at the same time. When an action is filed with the district court, it

is assigned to an Article III district judge. There is nothing in the U.S. Constitution, the United States Code, Federal Magistrate's Act, or elsewhere, that supports Sterling Commerce's position that Congress somehow intended that an Article III district judge's jurisdiction be terminated when a matter is referred to a magistrate pursuant to the Federal Magistrate's Act.

In fact, in 1984, Judge Anthony M. Kennedy, writing for the United States Court of Appeals for the Ninth Circuit, in the case of *Pacemaker Diag. Clinic of America, Inc. v. Instromedix, Inc.*[1], ruled that "[i]f the essential, constitutional role of the judiciary is to be maintained, **there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration and application of federal law."**[2] In this case, there was no appearance or reality of control by an Article III judge over the interpretation, declaration and application of federal law.

Thus, Sterling Commerce's position and that of the lower courts are erroneous. A magistrate, even upon referral by consent of the parties, is not the equivalent of an Article III district judge. Rather, the magistrate is an employee of the court. The magistrate's authority and power to act is completely subordinate and dependent upon the jurisdiction, power, and authority of the Article III district judge. The Article III district judge's jurisdiction, power, and

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[1] *Pacemaker Diag. Clinic of America, Inc. v. Instromedix, Inc.* (1984), 725 F.2d 537 (9th Cir.), certiorari denied 105 S.Ct. 100, 469 U.S. 824, 83 L.Ed.2d 45.
[2] *Id.* (Emphasis added.)

authority are derived from the United States Constitution and the legislative enactments of Congress. Thus, when Judge Kinneary (i.e. the assigned Article III district judge) retired, all proceedings, pleadings, and process should have been stayed until his replacement was appointed or the case was assigned to another Article III district judge. See, 28 U.S.C. §143.

III.

Sterling Commerce then argues that the Petition for a Writ of Certiorari is untimely. Again, Sterling Commerce is inaccurate and wrong. First of all, there was no Article III district judge assigned to the case. Thus, the magistrate had no jurisdiction, power, or authority to issue either judgment. All actions taken by the magistrate when he had no jurisdiction, power, or authority to act are void *ab initio*. A court's jurisdiction, or that of a judicial officer employed by a court, is always subject to review. Secondly, the judgment entry that is the genesis of this appeal imposed a monetary judgment of over $7,000 upon Moses. The judgment entry prior to that imposed no monetary judgment upon Moses. Thus, the judgment entries, while they are both unlawful, they are also significantly different in their financial impact upon the parties.

The Petition for a Writ of Certiorari in this case is timely. Sterling Commerce's arguments to the contrary are meritless.

IV.

The questions presented in this case are of first impression and go to the fundamental authority of a magistrate, as an employee of the court, to exercise judicial duties in an Article III United States District Court when no Article III district judge is assigned to the case.

1. 28 U.S.C. §143 requires that all proceedings be postponed when there is no district judge assigned to a case. District Judge Joseph Kinneary retired from the bench in 2001 and, to date, no district judge has been assigned to this case to replace him. In this case, after Judge Kinneary's retirement, the magistrate conducted proceedings, ruled upon motions, and dismissed the action with no hearing on the merits. With no district judge assigned to the case, was it proper and lawful for the magistrate to conduct proceedings, to rule upon motions, and to dismiss the action?

2. Civil rights actions, such as the Title VII action filed by Petitioner Moses in this case, are litigated in federal court under the jurisdiction of Article 111 judges. Federal law provides that even when a case is referred to a magistrate by consent of the parties pursuant to 28 U.S.C. §636, the referring Article III district judge remains assigned and continues to exercise supervisory jurisdiction over the case. Is it proper and constitutional for a magistrate to conduct proceedings and dismiss a case when there is no Article III judge assigned to that case?

This honorable Court has supervisory power to review the issues presented by this case and to provide a clear statement of law that cases filed in the district courts pursuant to Title VII of the Civil Rights Act of 1964, as amended, must have an Article III district judge assigned to them, even if the case has been "referred" to a magistrate for certain purposes. Under the United States Constitution and the requirements of 28 U.S.C. §143, a magistrate judge is not equivalent to an Article III district judge. The "civil jurisdiction", power, and authority of a magistrate judge is completely subordinate to the constitutional jurisdiction, power, and authority of an Article III district judge.

All process, pleadings, and proceedings, including the actions and inactions, of the magistrate judge that occurred while there was no district judge assigned to this case should be ruled as void *ab initio*.

Conclusion

For the foregone reasons, this Court should grant the Petition for a Writ of Certiorari and rule that the decisions of the lower courts be REVERSED, that the actions of the magistrate be ruled as void *ab initio*, and that this case then be REMANDED, assigned to a district judge, and allowed to proceed from that point.

Respectfully submitted,

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